

Tentative Minute Order re Motion to Dismiss

Defendant Juliana James England (“England”) moves to dismiss the First Superseding Indictment which charges three counts of wire fraud in violation of 18 U.S.C. § 1343. (Docket No. 82.) England asserts that the charges are time-barred, and that her Speedy Trial and Due Process rights have been violated. (Docket No. 87, pp. 7-10; Docket No. 94.) The Government has filed an Opposition. (Docket No. 98.) England has replied. (Docket No. 99.)

For the reasons set forth below, the Motion is denied.

I. Procedural History.

The original Indictment, charging three violations of the mail fraud statute, 18 U.S.C. § 1341, was filed on June 8, 2011. (Docket No. 1.) Based on Speedy Trial Act waivers and the need to replace England’s counsel because one of her counsel developed a serious medical condition which forced his withdrawal, the trial was continued a number of times. (E.g., Docket Nos. 12-17, 19, 20, 32, 34, 36, 37, 57, 58, 67, 68, 71, 72.) Most recently, the trial was scheduled to commence on August 4, 2015. (Docket No. 86.)

Approximately a week before trial, the Government discovered that the relevant statutory communication had been made by wire (e-mail) rather than mail. Thus, the Government secured a superseding indictment based on wire fraud rather than mail fraud. But for the statutory references, the allegations in the Indictment and First Superseding Indictment are virtually identical. (Compare Docket No. 1 with Docket No. 82.)

The Government moved to dismiss the original Indictment. (Docket No. 80.) In her opposition, England raised various grounds for dismissing First Superseding Indictment. (Docket No. 87.) The Court granted the Government’s Motion, and at a status conference, the Court offered England the opportunity to file a full motion to dismiss or to supplement her opposition to the Government’s Motion to Dismiss the original Indictment. England chose the later course. (Docket No. 94.)

II. Discussion.

England advances three grounds for dismissal: (1) the First Superseding Indictment is time-barred; (2) the delay in bringing this matter to trial has violated her Speedy Trial rights; and (3) the delay in bringing this matter to trial has violated her Due Process rights. None of these arguments has merits.

A. The First Superseding Indictment Is Not Time-Barred.

The filing of an indictment tolls the statute of limitations with respect to the charges asserted. United States v. Sears, Roebuck & Co., Inc. 785 F.2d 777, 778 (9th Cir. 1986). There is no contention here that the original Indictment was time-barred. A superseding indictment filed while the original indictment is pending is also timely provided it does not “broaden or substantially amend the charges in the original indictment.” Id. (internal quotation marks and brackets deleted).

The assertion of a different statute does not necessarily result in a time bar. In Sears, the original indictment asserted a violation of 18 U.S.C. § 542, entry of goods by means of a false statement while the superseding indictment asserted the more general false statements statute, 18 U.S.C. § 1001. Sears, 785 F.2d. 779. Because the two offenses have the same core elements, the Ninth Circuit held that the superseding indictment did not impermissibly broaden or expand the original charge. (Id.)

As reflected in the Ninth Circuit’s Model Jury Instructions, the elements of mail fraud and wire fraud are identical save for the instrumentality of interstate commerce. Compare Ninth Circuit Model Jury Instruction 8.121 with id. 8.124. The factual allegations concerning her scheme to defraud her employer, Callan Western Sales (“CWS”), are the same. Compare Indictment, ¶ 4 with First Superseding Indictment, ¶ 4.

The case law contemplates the use of superseding indictments to cure legal defects in a pleading even after the statute of limitations has run. United States v. Clawson, 104 F3d 250, 251 (9th Cir. 1996); United States v. Horowitz 756 F.2d 1400, 1403 (9th Cir. 1985). In terms of the pleadings, the Government has done no more than cure a technical defect, albeit a critical one for

jurisdictional purposes.

The First Superseding Indictment is not time-barred.

B. England's Speedy Trial Right Have Not Been Violated.

Each of the continuances in this case has been accompanied by a waiver of England's Speedy Trial Act rights, and many of them were triggered by England herself. The matter was continued twice to allow England to retain counsel. (Docket No. 32, 34.) When the Court appointed a member of the CJA panel, the trial was continued by stipulation. (Docket No 36.) New counsel was subsequently appointed, Diane Bass. The Court granted her request for withdraw, and Robison Harley was appointed. (Docket No. 56.) There were a number of interim stipulations until the Court was required to relieve Mr. Harley because of serious health conditions which prevented him from proceeding. (See Docket No. 70.) The Court then appointed England's current counsel, Karren Kenny. With that appointment, the parties stipulated to a continuance of the trial date to June 2, 2015, which the Court granted. (Docket Nos. 71, 72.) The parties stipulated to one more continuance which led to the August 4, 2015 trial date. (Docket Nos. 75, 76.)

In view of the new jurisdictional basis for the superseding indictment and the need for investigation and discovery on the issue, the Court granted a further continuance. (Docket No. 95.) After discussion with counsel, it became clear that Ms. Kenney's other trial commitments, including two trials in this Court prevented setting an earlier date. After extended colloquy, the Court took an oral waiver of the Speedy Trial Act from the defendant.¹ (Docket No. 95.)

Barker v. Wingo, 407 U.S. 514, 530 (1972), identifies four relevant factors to assess a violation of a defendant's Speedy Trial Rights under Sixth Amendment: "Though some might express them in different ways, we identify

¹The Court finds no Constitutional violation because England faced the dilemma of postponing the trial to retain her current competent counsel under the Six Amendment and diminishing her right to proceed to trial sooner. Stuard v. Steward, 401 F.3d 1064, 1069 (9th Cir. 2005). The Court squarely presented that dilemma to England, and found that she made a knowing, intelligent and voluntary decision to delay the trial and proceed with her current counsel. (Docket No. 95; Docket No. 96, p. 1.)

four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." The Court considers each but the overriding factor here is the reason for the delay.

With the exception of relieving one CJA counsel and relieving another CJA counsel for health reasons, all of the continuances have been at the behest of England as reflected in the series of stipulations. "[D]elay attributable to the defendant's own acts or to tactical decisions by defense counsel will not bolster defendant's speedy trial argument." McNeely v. Blanas, 336 F.3d 822, 827 (9th Cir. 2003).

The length of the delay, while substantial, must be considered in light England's agreement to the continuances at each turn. This not a basis for finding a violation of her Speedy Trial rights. England's assertion of her Speed Trial rights is counterbalanced, if not fully negated, by her consistent waiver of those rights.

England asserts four ground for prejudice. (Docket No. 94, p. 9.) It does not appear that any of the circumstances can be attributed to any specifically directed act upon the part of the Government or any general scheme or plan of delay on the part of the Government.

Related Bank Information. She asserts that she will not be able to obtain the banking records from the institution that issued the credit card she allegedly used. The Government asserts that it recently obtained business records showing that the monthly statements were e-mailed. (Supplemental Opposition, p. 12.) Presumably, these have now been produced in discovery. In her reply, England's counsel offers her declaration relating a July 29, 2015 conversation with an unnamed employee of the Huntington Beach branch of Citibank who told her that bank records from 2007 would have been purged. (Kenney Decl, ¶ 2, Docket No. 99, p. 11.) The Court would have been more convinced by a competent declaration from a Citibank employee, and even more convinced by the results from a subpoena duces tecum directed to the bank. Moreover, England fails to state in her papers or in the declaration of counsel precisely what these records would prove in England's defense.

Computer Access. England claims that CWS is long ago closed, its

owner deceased, Mike Callan, and that she cannot gain information concerning CWS' computer system. As the Government points out, England offers no basis for the assertion that Callan was knowledgeable of the system, and does not link any knowledge he may have had to the e-mails. Moreover, Callan was apparently suffering from dementia at the time the original indictment was filed. (Howard Decl., ¶ 3.) Thus, his assistance would have been questionable.

Fading Memories. While this may be a legitimate basis to find prejudice, United States v. Velasquez, 749 F.3d 161, 185 (3d Cir. 2014), England provides no specifics.

Unavailable Witnesses. England fails to identify a single person or even category of witnesses with material and relevant information.

The foregoing must also be considered against the background that when she left CWS, she never returned the computer that she used. (Docket No. 88, Ex. 1, p. 2.)

Considering all the factors outlined in Barker, the Court cannot say on balance that her Speedy Trial Rights have been violated.

C. England's Fifth Amendment Due Process Rights Have Not Been Violated.

In United States v. Sherlock, 962 F.2d 1349, 1354 (9th Cir. 1992), the court held, "The Fifth Amendment guarantees that defendants will not be denied due process as a result of excessive preindictment delay." The Ninth Circuit employs a two-pronged test:

First, Sherlock and Charley must prove they suffered actual, non-speculative prejudice from the delay. Second, they must show that the delay, when balanced against the prosecution's reasons for it, offends those fundamental conceptions of justice which lie at the base of our civil and political institutions.

(Id. at 1353-54; citations and internal quotation marks deleted.)

The first difficulty with this claim is that Sherlock focuses on pre-indictment delay not post-indictment delay. Assuming that the analysis starts anew with the filing of a superseding indictment, the Court would find no prejudice for the same reasons it found no prejudice in analyzing England's Speedy Trial Act claim.²

Moreover, the Court finds no culpability in the sense of a volitional or tactical act on the part of the Government to delay the proceedings. Whatever negligence may inhere in the Government's belated discovery that it was proceeding under the wrong fraud statute, that does not "offend[] those fundamental conceptions of justice." (Id.)

III. Conclusion.

For all the foregoing reasons, the Motion to Dismiss is denied. While denying the Motion, the Court does so without prejudice with respect to the prejudice arguments as they relate to the change from mail fraud to wire fraud. On the present record, the Court does not see that the change in theory has resulted in any "actual, non-speculative prejudice." Sherlock, 962 F.2d at 1354.

²If anything, England falls even shorter in making the showing required under Sherlock of "actual, non-speculative prejudice." Sherlock, 962 F.2d at 1353.